SUPREME COURT, U.S.
FILED
SEP 4 1971
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-192

JAMES JOHNSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
THE M/V FLYING A, AND BENDER
WELDING AND MACHINE COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT BENDER WELDING & MACHINE COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Johnson's Petition for a Writ of Certiorari presents two basic issues to this Court:

1. Does the shipowner owe a warranty of seaworthiness to a shore-based repair contractor's employee who is injured after control of the vessel is transferred to the contractor, and as a result of conditions created by the contractor?

2. Is a shore-side repair worker who is a specialist, and and whose work requires the use of sophisticated and special equipment not normally found aboard vessels at sea, doing "seamen's work," so as to be the beneficiary of an implied warranty of seaworthiness?

STATEMENT OF THE CASE

On June 9, 1966, the M/V FLYING A was delivered by her owner Oil Transport Company, Inc. ("Oil Transport"), to Bender Welding & Machine Company, Inc. ("Bender"), a ship repair contractor in Mobile, Alabama, for drydock and repair. Normal shipboard activities ceased upon transfer of control to Bender, and most of the officers and crew went on leave. None of the vessel personnel were quartered aboard her, no meals were prepared, and no watches kept. The only ship's officer who remained in the vicinity was the chief engineer, who stayed in Mobile to inspect and to pass upon the repairs as they were completed. Bender had absolute control over the manner and order in which the work was done, and sole supervision of the repair personnel.

The plaintiff James Johnson, an employee of Bender, was a skilled sand blasting specialist. His duties required the use of special shore-based equipment of a type which is never carried aboard vessels at sea. Mr. Johnson was injured when he fell off a scaffolding which had been erected around the vessel as she lay on drydock. Bender supplied and erected the scaffolding, and supervised the activities of the workmen operating on and around it.

In short, the record unequivocally shows that control over the vessel, and over the instrumentalities allegedly giving rise to the injury, had been transferred by the shipowner to the repair contractor, and that Mr. Johnson was not doing work traditionally performed by seamen.

Bender therefore respectfully submits that the Trial Court and the Court of Appeals for the Fifth Circuit were correct in deciding that the shipowner was entitled to summary judgement on the issue of unseaworthiness.

ARGUMENT

1. *The law as to the effect of transfer of control on the existence of the warranty of seaworthiness has been well established by this Court, and has been consistently followed by the Circuit Courts of Appeals.*

In *West vs. United States,* 361 U. S. 118 (1959), this Court held that where a ship needs repairs which require transfer of control from the shipowner to a shore-based contractor, there can be no implied warranty of seaworthiness to any person injured while the vessel remains in the control of the contractor. This rule is conceptionally sound and has been found to be workable in practice. Indeed, there is no conflict among the Circuits as to its application. See, e.g., *Moye vs. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968), *cert. den.*, 395 U. S. 913 (1969), *rehearing den.*, 395 U. S. 987 (1969); *Van Horne vs. Gulf Atlantic Towing Corporation,* 388 F.2d 636 (4th Cir. 1968); *Lawlor vs. Socony Vacuum Oil Company,* 275 F.2d 599 (2nd Cir. 1960), *cert. den.*, 363 U. S. 844 (1960).

The Court of Appeals for the Fifth Circuit in this case recognized and was guided by the settled authorities on the importance of control. *Johnson vs. Oil Transport Company, 440* F.2d 109, 111-116 (5th Cir. 1971). All parties recognized the significance of this issue, but petitioner did not and could not offer any evidence supporting his side of the contest. The District Court and the Fifth Circuit correctly decided that the record presented no genuine issue of fact on this point.

2. *The law is well settled that where the repair operation as a whole requires specialized skill and equipment the workers engaged therein do not perform work traditionally done by seamen, and are therefore not owed a warranty of seaworthiness.*

Since this Court decided the case of *United New York & New Jersey Sandy Hook Pilots Association vs. Halecki*, 358 U. S. 613 (1959), there has been no question but that one who is a "specialist," and whose work requires "special skill and special equipment" is not owed a warranty of seaworthiness. *West vs. United States, supra,* modified the classic "ship's service test" of *Halecki,* and instead focused attention upon the "status of the ship, the pattern of repairs, and the extensive nature of work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." [361 U. S. at 122.] Thus, rather than examining exactly the work being done by each individual workman at the time of his injury, the inquiry encompasses the entire repair operation, and seeks to determine whether the entire "pattern of repairs" is within the ambit of traditional seamen's work.

The Circuit Courts of Appeals have accurately applied these criteria since *Halecki* and *West.* See, e.g., *Atkins vs. Greenville Shipbuilding Corporation,* 411 F.2d 279 (5th Cir. 1969); *McCown vs. Humble Oil & Refining Company,* 405 F.2d 596 (4th Cir. 1969). The Fifth Circuit followed the settled law in the instant case. (440 F.2d 116-117.) The very fact that the repairs were extensive enough to require transfer of control to a shore-side contractor, with sophisticated equipment not found on vessels at sea, and with skilled laborers such as the petitioner, shows without question that the result reached by the lower court was correct.

CONCLUSION

We therefore respectfully submit that this Court has established clear and workable guidelines for determining the existence of the warranty of seaworthiness as it applies to shore-based repair workers, and that the Circuit Courts of Appeals have followed these guidelines; that there is no need to reconsider these standards; and that Johnson's Petition for Writ of Certiorari should therefore be denied.

Alex F. Lankford, III

ALEX F. LANKFORD, III

CERTIFICATE OF SERVICE

I, Alex F. Lankford, III, one of the attorneys for respondent Bender Welding & Machine Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 3rd day of September, 1971, I served three (3) copies of the foregoing brief on James Johnson, and on Oil Transport Company, Inc., by mailing same in duly addressed envelopes with first class postage prepaid to the Honorable Ross Diamond, Jr., Post Office Box 432, Mobile, Alabama 36601, and to the Honorable Brunswick Deutsch, 1700 Hibernia Bank Building, New Orleans, Louisiana 70112.

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